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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 888

KOPPERS COMPANY, INC., and THOMAS FLEXIBLE COUPLING COMPANY, Appellants

v.

UNITED STATES OF AMERICA, Appellee

On Appeal From the United States District Court for the Western District of Pennsylvania

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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On Appeal From the United States District Court for the Western District of Pennsylvania

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, the Appellants file this Brief In Opposition To The Government's Motion to Affirm.

THE LINE OF COMMERCE INVOLVED IN THIS CASE

The basic difficulty with the analysis and discussion of the line of commerce problem in the Motion to Affirm is that it does not reach the essential question, which is whether or not the Thomas disc type coupling actually competes substantially in the market place with the Koppers gear type coupling. Principal reliance is placed on the fact that there is a common definition which em-

braces both types of couplings and that there is a general industry classification which includes both types. Definitions and industry classifications however are labels only and may not be used as a substitute for a factual determination of whether or not products do in fact compete.

Four basic types of proof were submitted by the government and adopted by the district court in finding that disc type couplings and gear type couplings belong in the same line of commerce: (1) Stress is laid upon the fact that a common definition can be laid down which encompasses both types of couplings (M.A. 2, 6).[1] On this basis, the district court made a finding that "flexible couplings have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other products as to make them a line of commerce within the meaning of the Clayton Act" (J.S. 22). (2) A second factor relied upon in finding that disc type couplings and gear type couplings compete within the same line of commerce was that the Thomas Flexible Coupling Company and Koppers Company, Inc., made sales to a large number of common customers (J.S. 38). (3) The government urged that various studies indicated that the Thomas Company and Koppers Company made a large percentage of their sales of gear and disc type couplings for use on machinery having the same bore sizes (J.S. 38). The district court adopted these studies as proving or tending to prove that competition existed

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1. The argument advanced by the government and adopted by the court that: "the whole field of flexible couplings is encompassed in an article * * * entitled, 'Flexible Couplings'", appears to be but another interesting variant of the same argument.

between gear and disc type couplings. (4) Finally, the court relied on the fact that some few statements had been made by various witnesses including officials of Koppers and Thomas, indicating that "competition" existed between the two firms. (J.S. 32, 36, 37).

The appellants have no quarrel with the types of proof offered. We assert that they do not prove the essential fact required to be proved by the government, namely, that there was substantial competition between these two types of couplings in the market place. They do not go to the essential question of the quantum of competition between the two product lines. The government's argument in the Motion to Affirm ignores and the district court ignored the actualities of the market place which are essential to a proper resolution of the market problem in a case arising under Section 7 of the Clayton Act.

Since Section 7 of the Clayton Act is concerned with corporate mergers or acquisitions, a consideration of what constitutes "a line of commerce" arises under this section of the law only in terms of an acquisition or merger. Given such an acquisition or merger, the court's first task is to find "the area of effective competition" *United States v. DuPont and Co.*, 353 U.S. 586, 593. In order to perform this task the court must look to the companies involved and to their products. The very term used by the courts in discussing "line of commerce" questions, that is, the term, "relevant market", suggests that the market to be studied in any given case is the market which is relevant to the acquiring and the acquired firms' business.

An examination of the cases which have arisen under Section 7 of the Clayton Act will show that the courts have made precisely the approach of first looking to the products made or sold and bought by the companies involved in the merger or acquisition. Having made this examination, the courts have then proceeded to consider whether there were common lines of commerce involved. Thus, in *United States v. duPont*, 353 U.S. 586, this Court started with the fact that duPont produced automobile fabrics and finishes which were purchased by General Motors. This line of products became the relevant market for inquiry and since these common product lines had sufficient peculiar characteristics and uses to distinguish them from fabrics and finishes in general, they were deemed to constitute a line of commerce. Obviously in that case the fact that duPont was a major producer of cellophane and chemicals, and that General Motors was a major producer of cars, trucks and even household appliances was irrelevant because there was no indication that any of these product lines were bought from or sold to each other.

This same approach to the line of commerce problem was taken in *Crown Zellerbach Corp. v. Federal Trade Commission*, 296 F. 2d 800, 807 (C.A. 9), pending on petition for certiorari, No. 800, this Term:

> "We begin with what the record shows as to how St. Helens operated; what products it sold; where it sold those products; to what extent this constituted competition with the petitioner and others; what other producers were selling the same products in the same market; and, relative to all other suppliers of these products in the same area,

how much of a competitive factor St. Helens was. Of course the patterns of trade carried on by St. Helens alone do not furnish the entire answer in our effort to discover the patterns of trade in the paper industry which were followed in practice, from which the Board must determine the relevant market; but what St. Helens produced and sold in competition with other paper manufacturers, and particularly in competition with the petitioner, furnishes the best place to begin; and it is manifest that generally speaking we must find the relevant market product-wise in those products in which St. Helens was a significant factor before the merger. *Thus St. Helens produced no newsprint nor fine paper, and plainly enough, those types and grades do not figure here.*" (Emphasis supplied.)

Similarly, in *United States v. Bethlehem Steel*, 168 F. Supp. 576 (S.D.N.Y. 1958) both of the firms involved in the merger were major steel producers. The court found that *both* firms produced hot rolled sheets, cold rolled sheets, hot rolled bars, track spikes, tinplate, butt-weld, pipe, seamless pipe, oil field equipment and supplies. With respect to these items the court pointed out:

> "[E]ach has unique physical characteristics, is distinct from one another, has different end uses, and is recognized by steel producers and consumers as a distinct product. Each has its own competitive standards and markets. Finally there are no effective substitutes for any of them." Id. at 593.

Accordingly, each of these product lines was held to be "a line of commerce" within the meaning of Section 7 of the Clayton Act. The court then went on to consider

whether the iron and steel industry, itself, might not be an appropriate line of commerce for purposes of that case. The approach and reasoning of Judge Weinfeld on this issue is deserving of close scrutiny. He stated:

> "The products of the iron and steel industry as a group are generally standardized; are not subject to the vagaries of style appeal, and have peculiar characteristics and uses for which there are no effective substitutes. The manufacture of such products requires special know-how and experience, huge capital investment and a trained labor force. The products of the iron and steel industry are generally distinct one from the other and as a group distinct from the products of other industries. They are sold in a recognized market with its own competitive standards. The iron and steel industry is commonly recognized by its members as well as the community at large as a separate industry. It has its own trade association, treating the industry as separate and distinct. In light of these facts the conclusion is warranted that the sum of all the products of the iron and steel industry constitute a line of commerce. *Since Bethlehem and Youngstown both produce and sell the principal products of the iron and steel industry, it is an appropriate line of commerce for analyzing the effect of this merger.*" Id. at 593-94. (Emphasis supplied)

Had the district court, in this case followed the approach of Judge Weinfeld, a wholly different result would have been obtained.

Prior to the questioned merger, Koppers manufactured and sold a gear type flexible coupling, while

Thomas manufactured and sold a disc type flexible coupling. These were the only two relevant product lines involved in this acquisition. The question before the court was, therefore, whether or not these two product lines belonged in the same or different "lines of commerce".[2] The law requires and sound reasoning dictates, that in order to determine whether two different products belong in the same line of commerce, an inquiry must be made into the economic realities of the market or markets involved. As was pointed out in *United States v. Brown Shoe Co.*, 179 F. Supp. 721, 730 (E. D. Mo. 1959), pending on appeal No. 4 this Term:

> "An analysis of the maze of cases on the subject leads one to the conclusion that a 'line of commerce' cannot be determined by any process of logic and should be determined by the processes of observation (citation omitted) . . ."

The facts established at trial in this case reveal that there existed a number of differences between the disc type flexible coupling and the gear type flexible coupling. These two types of couplings are physically quite dis-

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2. Appellants recognize that had Koppers and Thomas both been producers of gear type couplings and disc type couplings then following the rational of *United States v. Bethlehem Steel*, 168 F. Supp. 576 (S.D.N.Y. 1958) it would have been appropriate for the district court to have examined the impact of this merger on the larger market comprised of these two product lines. Indeed if Koppers and Thomas had both been producers of gear type couplings alone, the government's position in this case would undoubtedly be that gear type couplings constitute a "line of commerce" in themselves, as opposed to all other types of flexible couplings.

similar (J.S. 29), and function quite differently in achieving flexibility (J.S. 29). Testimony from both government and defense witnesses indicated that a large number of significant engineering differences existed between these two types of couplings.[3] It was against the background of these recognized engineering differences

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3. Some of the significant differences from an engineer's standpoint which were shown to exist between gear type couplings and disc type couplings are:

   A. The disc type coupling is non-lubricated while the gear type coupling requires a lubricant (J.S. 30). Thus on applications where the presence of a lubricant is undesirable the gear type coupling simply cannot be used.

   B. The disc type coupling is free from backlash (i.e., reversing forces or movements within the coupling) while the gear type coupling does have backlash.

   C. The disc type coupling is a torsionally stiff coupling while the gear type coupling is a torsionally indeterminate coupling (Tr. 300-303). Thus on applications where torsional vibrations create problems within the mechanical system these two types of couplings have very different characteristics (Tr. 290, 298, 300-303).

   D. On certain high speed applications the gear type coupling stays in balance while the disc type does not (Tr. 362-363).

   While there are other differences appearing in the record the important factors which appellants wish to stress are that both gear type couplings and disc type couplings are highly engineered, precision-made industrial products which may sell for as much as thousands of dollars apiece, and that there are sound engineering reasons which underlie the fact that there is less than 10% competition between the two product lines.

between disc and gear type couplings, that the appellants' witness, Mr. Werner, conducted a survey of the actual sales of the Thomas Company made during 1960. The purpose of this survey was to ascertain the actual percentage of sales of disc type couplings manufactured by Thomas which were in *possible* competition with the Koppers gear type coupling[4]. The results of the survey, as the appellants pointed out in the Jurisdictional Statement, reveal that only 8.19% of the total sales made by Thomas in 1960 were possibly competitive with the Koppers gear type coupling.

This is the only evidence in the record in this case on the *quantum* of competition between these two product lines.[5] And this evidence was not even discussed by the court in deciding on what was the line of commerce involved in this case. After concluding on definitions, semantics and the literature that there was only one line of commerce involved, the court then turned to the quantum of competition in its consideration of the *effect* of the acquisition on competition. The government contends that the district court in effect rejected this survey. The district court (J.S. 31-32) could not under the

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4. Mr. Werner was testifying as an engineer whose qualifications were never disputed by the government that for engineering reasons the vast majority of coupling sales made by Thomas were for use on applications on which a gear type coupling could not be used.

5. At page 8 of the Motion to Affirm reference is made to certain correspondence as showing that the two types of couplings were in competition. We think that the statements are entitled to little if any weight on the question of competition, since they so obviously represent only puffing by salesmen.

law have rejected this survey on the record in this case. No government witness purported to make a study of the amount of competition existing between gear type couplings and disc type couplings. There is no basis for doubting the accuracy or credibility of the witness. Under such circumstances this Court has held that the testimony of one skilled in the business that no real competition exists between the products "should be accepted" *International Shoe v. Federal Trade Commission*, 280 U.S. 291, 299.

The appellants contend the district court committed clear error in making the finding that it had not been established on the record that the purchase of couplings is primarily determined by engineering considerations (J.S. 4 Question 2). The fact is that every witness who testified about the subject of who controls the purchasing of flexible couplings stated that the purchasing of flexible couplings by the customers in the market place was controlled by trained engineers (Tr. 147, 303-304, 335, 340, 356). There was no contrary testimony offered. This question was not argued in the Jurisdictional Statement since it is essentially a subsidiary issue on the "line of commerce problem".

We therefore submit that the trial court erred substantially in basing its ultimate finding that there was only one line of commerce involved here on definitions, semantics and literature; in not even considering the *quantum* of competition between these two product lines in reaching this ultimate finding; and in not reaching the ultimate finding that there were two product lines because the only pertinent evidence in the record on the question of *quantum* of competition showed that there was less than 8.19% per year.

We now turn to the government's contention that the ancillary findings described on pages 9 and 10 of its Motion independently support the judgment below, whatever the amount of competition between the two product lines. These findings are based on the assumption that there was one line of commerce involved in the case within which all of these companies competed. The government errs in believing that these findings can determine this case without regard to the amount of competition between the two product lines involved here. If there were no competition between the two product lines, obviously they would constitute two separate lines of commerce and these findings as to competition would fall. It is obvious that the court in adopting them did not consider the acquisition involved to be a conglomerate one. The court considered it to be a horizontal one. That being true, the ancillary findings cannot independently support the decree if the basic conclusion of the type of merger involved is erroneous.

Thus, appellants submit that a substantial legal problem exists in the line of commerce aspects of this case which ought to be resolved by this Court.

THE REMEDY

Appellants do not dispute the legal propositions set forth in the cases cited by the government in its Motion to Affirm bearing on the question of the appropriate remedy in a case arising under Section 7 of the Clayton Act. Appellants contend that a fair reading of the Judge's ruling on the argument concerning the remedy (J.S. 67-69) reveals that the district court was ruling that the law permitted no alternative remedy to divestiture.[6] This, appellants contend, constitutes clear error on the part of the district court.

One further aspect of the government's argument on the "remedy" problem of this case deserves comment. The government seems to assert that the appellants were guilty of laches for failure to propose workable alternatives to divestiture at the argument on January 24th. However, the facts are that the district judge filed his lengthy Opinion and Findings of Fact on January 10, 1962, (J.S. 13-58). On January 17th, the government filed its proposed decree. On Friday, January 19th, the following order of the district judge was filed:

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6. The district court was quite explicit in its ruling at two different points in the brief discussion that was, in Counsel's opinion, stretched to the permissible limits of advocacy:

   A. "I can't see any other remedy. I think the law compels that, and that's the history of this type of legislation. I think it is just simply that, and if the Court reaches a conclusion, that is the only thing that follows" (J.S. 68).

   B. "I think we have got to go on the grounds of divestiture. That is what is contemplated in the statute, that has to be the remedy" (J.S. 69).

"AND NOW, this 18th day of January, 1962, the United States having submitted a proposed final decree, a hearing is directed to be held on Wednesday, January 24, 1962, at 11:00 A.M., at which time defendants will be heard on any objections to the proposed decree as submitted."

On Tuesday, January 23rd, the appellants' objections to the decree (J.S. 59-60) were filed and prior to the hearing on January 24th, the appellants' supporting memorandum of law (J.S. 60-63) asking for reasonable time to propose and to support alternative remedies was filed.

Appellants urge that in light of the surrounding circumstances they acted timely in asserting their right to a hearing on the question of the proper remedy. This hearing was never afforded appellants due to the district judge's conclusion and ruling that the law permitted no alternative to divestiture.

CONCLUSION

For the reasons stated, the appellants urge that the government's Motion to Affirm be denied, and urge that this Court note probable jurisdiction in this case.

Respectfully submitted,

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